STATE OF MICHIGAN

COURT OF APPEALS

HEATHER ROSE PHILLIPS,

Plaintiff-Appellant/Cross-Appellee,

and

IAN PIPER,

Intervening Plaintiff/Cross-Appellant,

v

SHANE JOSEPH PHILLIPS,

Defendant-Appellee/Cross-Appellee.

UNPUBLISHED
April 17, 2014

No. 315429
Alpena Circuit Court
LC No. 11-004101-DM

Before: SHAPIRO, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

This appeal concerns essentially two separate cases arising out of divorce proceedings between plaintiff-mother, Heather Phillips (née Fuller), and defendant-father, Shane Phillips. First, plaintiff appeals from the judgment of divorce that awarded defendant primary physical custody of the two minor children born during the marriage, GP and LP. The parties were awarded joint legal custody. Second, intervening plaintiff Ian Piper appeals from the same judgment of divorce that denied his motion regarding parental status brought under the Revocation of Paternity Act (RPA), MCL 722.1431 *et seq.*, and declared defendant the legal father of GP.

I. FACTS

Plaintiff and defendant were married on January 3, 2008. At the time, defendant was aware that he was not the biological father of plaintiff's yet-unborn child. Plaintiff gave birth to the child, GP, on April 30, 2008, after the marriage. A second child, LP, was born on January 7, 2010. There is no dispute that defendant is LP's biological father. Plaintiff and defendant separated on April 15, 2011 and subsequently filed cross-complaints for divorce.

During the pendency of the divorce proceedings, Piper filed a motion to intervene and obtain parental rights or parenting time to GP under the RPA, alleging that he was the child's biological father. He testified that, in the summer of 2007, he was involved in a relationship with plaintiff that resulted in her becoming pregnant. At the time of conception, neither plaintiff nor Piper was married. Around October 2007, Piper returned to Iowa due to his employment. Before he left, plaintiff informed him that she was pregnant and that he "could possibly be the father." However, he stated that, "I moved back to Iowa and I hadn't really heard anything of it. And then I found out that [plaintiff] and [defendant] had gotten married, and that was the last I heard of it." Piper moved back to Michigan early 2011 and met GP for the first time in July 2011, when the child was three years old. In November 2011, he voluntarily submitted to a DNA paternity test that revealed a 99.99% probability that he was GP's biological father.

The trial court held a combined best-interests hearing to determine the custody arrangement between plaintiff and defendant and whether Gavin should be declared born "out of wedlock" under the RPA. After the hearing, the trial court determined that it was not in Gavin's best interests to be declared born "out of wedlock" under the RPA and thus denied Piper any parental rights or parenting time. The court also declared defendant to be GP's legal father. The trial court then analyzed the best-interest factors applicable to the custody determination between plaintiff and defendant and awarded defendant primary physical custody. Plaintiff was awarded parenting time every weekend from Thursday morning until noon on Saturday, with the parties equally dividing summer months and alternating holidays.

II. ESTABLISHED CUSTODIAL ENVIRONMENT

Plaintiff argues that the trial court erred by failing to determine whether the children enjoyed an established custodial environment with plaintiff, defendant, or both prior to awarding defendant primary physical custody.

"Determining whether the trial court erred by failing to consider the existence of an established custodial environment before making its custody ruling requires the interpretation of § 7 of the Child Custody Act, MCL 722.27. Statutory interpretation is a question of law we consider de novo." *Kessler v Kessler*, 295 Mich App 54, 59; 811 NW2d 39 (2011).

MCL 722.27 provides in pertinent part:

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interest of the child the court may do 1 or more of the following:
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> * * *
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> (c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age and, subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, until the child reaches 19 years and 6 months of age. *The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child*

> *unless there is presented clear and convincing evidence that it is in the best interest of the child.* The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered . . . . [Emphasis added.]

We have ruled that "a trial court is required to determine whether there is an established custodial environment with one or both parents before making *any* custody determination." *Kessler*, 295 Mich App at 61; see also *Thompson v Thompson*, 261 Mich App 353, 360-362; 683 NW2d 250 (2004).

In this case, custody of GP and LP was governed by a court order in the form of a temporary custody order that placed the children with plaintiff and defendant on a week-on, week-off basis during the pendency of the divorce proceedings. Accordingly, before altering the week-on, week-off physical custody arrangement, the court was first required to determine whether the children had an established custodial environment with plaintiff, defendant, or both parties. *Kessler*, 295 Mich App at 61. The trial court failed to do so.

> [A] trial court's failure to apply the law by not first determining whether there was an established custodial environment is clear legal error, and . . . we must remand unless the error is harmless. The failure to determine whether there is an established custodial environment is not harmless by the trial court's determination regarding whether an established custodial environment exists determines the proper burden of proof in regard to the best interests of the children. [*Id*. at 62.]

The trial court's failure to make this required determination necessitates remand because "we decline to consider whether the children had an established custodial environment . . . because that is a question of fact for the trial court, and we do not engage in review de novo of custody orders." *Id*. "On remand, the trial court must determine whether an established custodial environment existed with plaintiff, defendant, or both parties before it determines the custody arrangement that serves the best interests of the children." *Id*. If it determines established custodial environments exist with both plaintiff and defendant, the trial court may not alter the existing custody arrangement unless there is clear and convincing evidence that it is in the children's best interests to do so. *Rains v Rains*, 301 Mich App 313, 325; 836 NW2d 709 (2013).[1]

[1] We reject plaintiff's contention that we may elect to address the trial court's analysis of the best-interest factors and reverse its physical custody determination. Custody determinations are not reviewed de novo. *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006). Because we "will defer to the trial court's credibility determinations, and the trial court has discretion to accord differing weight to the best-interest factors[,]" *Rains*, 301 Mich App at 329

III. INTERVENING PLAINTIFF AND THE RPA

Piper filed a motion to intervene in the divorce proceedings between plaintiff and defendant in order to establish GP's paternity.[2] MCL 722.1441(3) provides:

> If a child has a presumed father, a court may determine that the child is born out of wedlock for the purpose of establishing the child's paternity if an action is filed by an alleged father and any of the following applies:
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> * * *
>
> (c) Both of the following apply:
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> (*i*) The mother was not married at the time of conception.
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> (*ii*) The action is filed within 3 years after the child's birth. The requirement than action be filed within 3 years after the child's birth does not apply to an action filed on or before 1 year after the effective date of this act.

In this case, defendant is GP's "presumed father" because he was married to plaintiff when she gave birth. MCL 722.1433(4). Piper is the "alleged father." MCL 722.1433(3). After hearing Piper's testimony at the August 21, 2012 motion hearing, the court found that: (1) plaintiff was not married at the time of GP's conception, (2) Piper's motion was filed within one year of the effective date of the RPA, (3) Piper was GP's biological father, and (4) GP was born "out of wedlock" for purposes of the RPA and, therefore, granted Piper's motion to intervene. It is undisputed that Piper established both necessary elements under MCL 722.1441(3)(c) and the trial court found as such at the motion hearing. However, notwithstanding that ruling, the proper determination of the "out of wedlock" legal classification may require an inquiry beyond the elements of MCL 722.1441(3) and implicate a best-interest analysis as provided by MCL 722.1443(4):

> A court may refuse to enter an order setting aside a paternity determination or determining that a child is born out of wedlock if the court finds evidence that the order would not be in the best interests of the child. The court shall state its reasons for refusing to enter an order on the record. The court may consider the following factors:
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> (a) Whether the presumed father is estopped from denying parentage because of his conduct.
>
> (b) The length of time the presumed father was on notice that he might be the child's father.

(citation omitted), remand is necessary to allow the trial court to make a best-interests ruling under the proper evidentiary standard.

[2] MCL 722.1441 provides: "An action under this section may be brought . . . by a motion filed in an existing action . . . ."

(c) The facts surrounding the presumed father's discovery that he might not be the child's father.

(d) The nature of the relationship between the child and the presumed or alleged father.

(e) The age of the child.

(f) The harm that may result to the child.

(g) Other factors that may affect the equities arising from the disruption of the father-child relationship.

(h) Any other factor that the court determines appropriate to consider.

In a November 27, 2012 order, the trial court analyzed these factors and determined that declaring GP born "out of wedlock" was not in his best interests and declared defendant GP's legal father.

A. RES JUDICATA

Piper first argues that the doctrine of res judicata barred the trial court from reversing its ruling, made at the motion hearing, that GP was born "out of wedlock" for purposes of the RPA. We review de novo questions of statutory interpretation, *Kessler*, 295 Mich App at 59, and the application of res judicata, *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004).

> The elements of res judicata are as follows: (1) the prior action was decided on the merits, (2) the prior decision resulted in a final judgment, (3) both actions involved the same parties or those in privity with the parties, and (4) the issues presented in the subsequent case were or could have been decided in the prior case. [*Duncan v State*, 300 Mich App 176, 194; 832 NW2d 761 (2013).]

Res judicata bars a "subsequent case[,]" *id.*, and does not apply within a single action, *Harvey v Harvey*, 237 Mich App 432, 437; 603 NW2d 302 (1999). There was no such subsequent action filed in this case to which the doctrine would apply. Further, res judicata only applies when "the issues presented . . . were or could have been decided in the prior case." *Duncan*, 300 Mich App at 194. Again, there was no "prior case" involved in these proceedings.

Piper alleges that the issue of whether GP was born "out of wedlock" was "litigated and ruled on during the August 21, 2012 [motion] hearing." However, it cannot be said that the issue was "litigated," given that the court had not determined whether to consider the best-interest factors before rendering its ultimate decision on Piper's request that GP be declared born "out of wedlock" under the RPA. Earlier in the motion hearing, the court found that Piper was GP's biological father, but stated that, "That is not to say, however, that Mr. Piper enjoys any kind of rights until further order of this Court concerning parenting time – custody, parenting time, or support. Those issues are going to have be resolved at a – at a hearing down the road." A review of the August 21, 2012 hearing makes clear that while the trial court found that Piper was the child's biological father and permitted him to intervene, it did not declare Piper or defendant

GP's legal father. Accordingly, given that the trial court had taken no testimony regarding the custody of the children, even as to between plaintiff and defendant, any rulings the trial court made at the August 21, 2012 motion hearing cannot be considered a "final judgment" to which res judicata would apply. *Id*. Accordingly, Piper's res judicata claim fails.

B. BEST INTERESTS

Piper next argues that the trial court erred by ruling that it was not in GP's best interests to be declared born "out of wedlock" under the RPA.

> The Revocation of Paternity Act does not provide a standard by which this Court should review the trial court's decision. Generally, this Court reviews for clear error the trial court's factual findings in proceedings involving the rights of children, and reviews de novo issues of statutory interpretation and application. The trial court has committed clear error when this Court is definitely and firmly convicted that it made a mistake. [*In re Moiles*, 303 Mich App 59, 65-66; 840 NW2d 790 (2013).[3]]

The trial court ruled that, because Piper established the necessary elements of MCL 722.1441(3)(c), it had the power to determine that GP was born "out of wedlock" and allow Piper to assert parental rights. See MCL 722.1443(2). The court aptly noted that the RPA only provides that a trial court *may* find that a child was born out of wedlock if the relevant elements are met.[4] See *Port Huron v Amoco Oil, Inc*, 229 Mich App 616, 631; 583 NW2d 215 (1998) (It is a well-established rule of statutory interpretation that "[w]hile the word 'shall' is generally used to designate a mandatory provision, 'may' designates discretion").

The trial court analyzed the best-interest factors of MCL 722.1443(4) and ruled that a determination that GP was born "out of wedlock" was not in his best interests. Piper argues that the trial court legally erred in its interpretation and application of these best-interest factors. Piper acknowledges that the trial court ruled correctly on factor (a),[5] but takes issue with each of the other factors.

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[3] In *Moiles*, we held that a trial court need not perform the MCL 722.1443(4) best-interests analysis when revoking an acknowledgement of parentage under the RPA, MCL 722.1443(2)(a). 303 Mich App at 74. However, in this case, it is undisputed that Piper sought a determination that GP was born "out of wedlock," which is expressly subject to a best-interest analysis. MCL 722.1443(4) ("A court may refuse to enter an order . . . determining that a child is born out of wedlock if the court finds evidence that the order would not be in the best interests of the child").

[4] See also MCL 722.1445, which provides: "If an action is brought by an alleged father who proves by clear and convincing evidence that he is the child's father, the court *may* make a determination of paternity and enter an order of filiation . . . ." (Emphasis added.)

[5] The court wrote: "Factor (a) does not apply to the present circumstances. Here, we do not have a situation where the presumed father is attempting to avoid his parental obligations. It's quite

1. FACTOR (B): THE LENGTH OF TIME THE PRESUMED FATHER WAS ON NOTICE THAT HE MIGHT BE THE CHILD'S FATHER

Regarding factor (b), the trial court wrote:

> Factor (b) is again difficult to analyze under the present facts. The language appears to imply that where a father is on notice that he may not be the biological parent of the child for a long period of time, he should not be allowed to escape his obligations. Again, this does not apply in the present case. [Defendant] is trying to retain his parental rights.

Both plaintiff and defendant testified that defendant was aware that he was not GP's biological father when the two were married and that he has never been under any other impression. As the trial court noted, it is difficult to determine how this factor applies in this case, given that defendant wishes to retain his parental rights to GP. Piper argues that factor (b) is intended to account for the amount of time that the presumed father detrimentally relied on the misconception that he was the child's biological father. Since such a circumstance does not exist in this case, Piper argues that the factor favors his position. On the contrary, it appears that defendant's willingness to raise GP as his own son, with the approval of plaintiff, even though he always knew that he was not the biological father weighs in defendant's favor. Accordingly, the trial court's finding that factor (b) weighed in favor of defendant was not clearly erroneous.

2. FACTOR (C): THE FACTS SURROUNDING THE PRESUMED FATHER'S DISCOVERY THAT HE MIGHT NOT BE THE CHILD'S FATHER

Regarding factor (c), the trial court wrote:

> Factor (c), which addresses the facts surrounding the presumed father's discovery of the truth regarding paternity, weighs in favor of [defendant's] continued paternity. [Defendant] understood that he was not [GP]'s biological father from the time he was born. He assumed the role of father. There is nothing in the record which would indicate that he treated [GP] any differently than his true biological children. As such, he demonstrates that he has accepted [GP] as his own child despite their true biological relationship.

Again, plaintiff and defendant both testified that defendant has always been aware that he is not GP's biological father but has treated the child as his own since birth. Defendant knew, apparently before he married plaintiff, that he was not the biological father of her yet-unborn child. Yet, defendant agreed to raise the child as his own and has done so ever since. Accordingly, the trial court's finding that factor (c) favored plaintiff was not clearly erroneous.

3. FACTOR (D): THE NATURE OF THE RELATIONSHIP BETWEEN THE CHILD AND THE PRESUMED OR ALLEGED FATHER

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the opposite. [Defendant] wants to continue his role as a father to [GP]. As such, this factor is inapplicable."

Finding that factor (d) weighed in defendant's favor, the trial court wrote:

> Factor (d) addresses the relationship between the child and alleged or presumed father. Here, it is apparent that the child has developed emotional bonds with [defendant] and a social bond with Mr. Piper. Given this, [defendant's] position on this factor is much stronger than Mr. Piper.

Defendant has been GP's father, both legally and in practical effect, since GP was born. There was testimony that Piper had provided some father-like functions to GP in the year leading up to the best-interests hearing. However, there was also testimony that one of GP's step-brothers provided the same type of assistance. Defendant has supported GP his entire life and continues to provide a home environment. GP also considers only defendant to be his father. Accordingly, the trial court's finding that factor (d) favored defendant was not clearly erroneous.

4. FACTOR (E): THE AGE OF THE CHILD

Finding that factor (e) weighed in defendant's favor, the trial court wrote:

> Factor (e) addresses the child's age. The child is four-and-one-half years of age at this writing. He has enjoyed a normal development and is of pre-school age. He has socialized with children who have fathers and knows the role of a father in a family setting. He recognizes the parental authority of [defendant] exclusively. This factor favors [defendant].

The trial court's opinion analyzing these best-interest factors was issued on November 27, 2012, when GP was over 4 1/2-years old. There was no evidence that GP was not healthy and progressing well developmentally after having been raised by defendant his entire life. It was established that GP considers only defendant as his father. Accordingly, the trial court's finding that factor (e) favored defendant was not clearly erroneous.

5. FACTOR (F): THE HARM THAT MAY RESULT TO THE CHILD

Finding that factor (f) weighed in defendant's favor, the trial court wrote:

> Factor (f) evaluates the harm that may result from revocation. This Court ordered the parties to be evaluated by a licensed psychologist. Dr. Stiger's report identifies conflict on the part of [defendant] and [plaintiff]. It also speaks to the bad judgment of [plaintiff] in introducing Mr. Piper to [GP]'s life at this time. Most importantly it concludes that without family therapy [GP] will be emotionally overwhelmed if he learns today that the person who he identifies as his father is truly not his father.

The psychologist's report referenced by the trial court was not provided to this Court. However, we believe that it does not require a professional medical opinion to surmise that informing a 4 1/2-year-old child that the man he has known his whole life to be his father is actually unrelated has the potential to cause harm. However, the trial court's comment that plaintiff exercised bad judgment in introducing GP to Piper applies more appropriately to its custody determination between plaintiff and defendant, not Piper. Nonetheless, because it could

presumably harm GP to learn that defendant is not his father at this time, the trial court's finding that factor (f) favored defendant was not clearly erroneous.

6. FACTOR (G): OTHER FACTORS THAT MAY AFFECT THE EQUITIES ARISING FROM THE DISRUPTION OF THE FATHER-CHILD RELATIONSHIP

Finding that factor (g) weighed in defendant's favor, the trial court wrote:

> Factor (g) allows the Court to look to any other factors that may affect the equities arising from the disruption of the father-child relationship. Again, the Court looks to Dr. Stiger's report. He opines that [GP] should not be subjected to the truth regarding his biological father at this time. [GP] believes [defendant] is his father; disrupting that would not be in his best interests.

For the reasons discussed in factor (f), it can be reasonably surmised that GP would be harmed by learning that Piper is his biological father, thus permanently disrupting the 4 1/2-year father-son relationship he possesses with defendant. Accordingly, the trial court's finding that factor (g) favored defendant was not clearly erroneous.

7. FACTOR (H): ANY OTHER FACTOR THAT THE COURT DETERMINES APPROPRIATE TO CONSIDER

Finding that factor (h) weighed in defendant's favor, the trial court wrote:

> Factor (h) looks to any other factor that the court determines appropriate to consider. Here, the Court finds that everything on the record favors continuing the established parental relationship. Future complications are likely to arise, but at this stage of the boy's life, introducing a new father would be potentially devastating to [GP].

The court's finding on this factor again reiterates that GP possesses a healthy father-son relationship with defendant, one that it is not in GP's best interests to disrupt. Accordingly, the trial court's finding that factor (h) favored defendant was not clearly erroneous.

8. CONCLUSION

The trial court's finding that factor (a) does not apply in this case is unchallenged and its findings that factors (b), (c), (d), (e), (f), (g), and (h) favored defendant were not clearly erroneous. Accordingly, we find that the trial court did not err by ruling that it was not in GP's best interests that he be declared born "out of wedlock."[6]

[6] Because we find that the trial court did not err by denying Piper parental rights or parenting time to GP under the RPA, we need not address the court's alternate basis for that ruling – the equitable parent doctrine.

We vacate the trial court's grant of primary physical custody of the children to defendant and remand for proceedings consistent with this opinion. We affirm the trial court's rulings regarding intervening plaintiff Piper. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens